No. 14502.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BUTCHERS UNION LOCAL No. 563, Affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor,

Appellant,

vs.

COMMERCIAL PACKING COMPANY, INC.,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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Statement of Jurisdiction.

Jurisdiction of the District Court.

This action was commenced by the Appellee, hereinafter sometimes referred to as "Company," against the Appellant, hereinafter sometimes referred to as "Union," under Section 301 of the Labor-Management Relations Act of 1947, 29 U. S. C. Sec. 185, commonly referred to as the Taft-Hartley Act [R. 3]. The Union moved to stay all proceedings pending arbitration pursuant to Section 3 of the United States Arbitration Act, 9 U. S. C. Sec. 3 [R. 23]. The District Court denied the Union's motion [R. 29].

Jurisdiction of This Court.

This court does *not* have jurisdiction of an appeal from the denial of the Union's motion to stay proceedings pending arbitration under Section 3 of the United States Arbitration Act. The order of denial is not an appealable interlocutory order under 28 U. S. C. Sec. 1292, particularly since this record fails to show that the Union is raising an equitable defense to the Company's action.

Schoenamsgruber v. Hamburg American Line, 70 F. 2d 234, 236 (9th Cir. 1934) aff'd. 294 U. S. 454, 456 (1935);

Continental Grain Co. v. Dant & Russell, Inc., 118 F. 2d 967, 968 (9th Cir., 1941).

See:

Baltimore Contractors, Inc. v. Bodinger, —U. S.—, 99 L. Ed. (Adv. p. 171, 1955).

Statute Involved.

The provisions of the United States Arbitration Act (Act of Feb. 12, 1925, C. 213, as enacted into positive law by Act of July 30, 1947, C. 392, 9 U. S. C. Secs. 1-14) which are pertinent to this proceeding provide:

"Sec. 1. . . . 'commerce,' as herein defined, means commence among the several States . . ., *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.* (Emphasis added.)

"Sec. 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and en-

forceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court* in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,* shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (Emphasis added.)

"Sec. 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate . . . may petition any court of the United States . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . upon being satisfied . . . the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

Pleadings Showing the Existence of Jurisdiction.

The Company operates a large meat packing plant in Los Angeles, California. In its complaint it alleged as follows:

> The Company annually ships to points outside the State of California and annually imports from states outside the State of California merchandise with a value in excess of $1,000,000.00, thereby coming within the meaning of "commerce" as used in the Taft-Hartley Act [R. 4]. The Company and the Union entered into a written collective bargaining

agreement covering the wages, hours and working conditions of the Company's production employees [R. 5]. This agreement is now and will remain in effect until March 1, 1956 [R. 6]. On or about January 31, 1952 the Union, without any cause or provocation and without the permission or consent of the Company, issued directions to its members employed by the Company to slowdown and thereby reduce their daily production to an amount arbitrarily determined by the Union. This arbitrary reduction of production was known as "controlled kill" [R. 6-7]. As a direct result of controlled kill, the Company has sustained damages in the sum of $534,-759.20 through April 30, 1954 and such further sum as may be incurred from and after said date to the trial date of this action [R. 10].

Article VII of the collective bargaining agreement between the parties contains a grievance procedure [R. 15], and Article XII provides for the arbitration of grievances [R. 20].

The Union moved to dismiss the action or in the alternative to stay all proceedings pending arbitration [R. 23].

The district court denied the motion to dismiss [R. 27]. No appeal has been taken from such denial. The basis of the district court's denial was that the contract involved herein was expressly excluded from the operation of the United States Arbitration Act [R. 27].

Questions Presented.

1. Can an action for breach of a collective bargaining agreement covering workers engaged in the production of goods for interstate commerce be stayed pending arbitration under the provisions of Section 3 of the United States Arbitration Act?

2. Even if the United States Arbitration Act were applicable to the action described in the above question, can the issue presented by the pleadings herein be referred to arbitration under the Act?

Summary of Argument.

The Company's suit can be stayed pending arbitration by a federal court only under Section 3 of the United States Arbitration Act. However, there is excepted from the Act "contracts of employment . . . of workers engaged in . . . interstate commerce." The legislative history of the Act shows that the purpose of Congress was to frame a commercial rather than a labor arbitration act. From its language and from its obvious purpose, it is, therefore, concluded that collective bargaining contracts are excluded from the Act as "contracts of employment."

Even if this court should hold that collective bargaining agreements are not excluded from the operation of the Arbitration Act, the Union's motion to stay must be denied. Under Section 3 a federal court is empowered to stay a suit on a contract containing an arbitration clause only if the suit involves an issue "referable to arbitration" under the contract. The contract between the parties provides that only "grievances" are arbitrable. Under the contract the Company has no right to file a grievance, nor is the issue of its damages arising out of the Union's breach an arbitrable issue. It follows that the sole recourse of the Company is in the courts, and that the lower court was correct in so holding.

ARGUMENT.

I.

The Company's Action for Damages Cannot Be Stayed Under Section 3 of the United States Arbitration Act Because the Contract Between the Parties Is Expressly Excluded From the Operation of the Act by Section 1 Thereof.

The answer to the first issue posed above turns on the meaning of the exclusionary clause of the United States Arbitration Act which reads:

> "But nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Page 9 of Appellant's Opening Brief makes the point that "the statute is plain and unambiguous." Unfortunately, the courts have not so found it. The major portion of Appellant's Opening Brief belies this statement, and a substantial portion of this brief will also discuss the meaning of the exclusionary clause.

The circuit courts who have heretofore considered this problem have taken three different positions: The Sixth and Tenth Circuits have held that collective bargaining agreements are excluded from the operation of the Arbitration Act. The Third Circuit has taken a middle ground holding that collective bargaining agreements are excluded from the operation of the Act, but that those collective bargaining agreements which cover workers engaged in the production of goods for interstate sale are not so excluded. The Fourth Circuit has held that collective bargaining agreements are not excluded from the operation of the Act.

A. The Exclusionary Clause Applies to the Entire Arbitration Act.

Appellee urges adoption of the theory of *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.,* 168 F. 2d 33 (4th Cir. 1948), which held that collective bargaining agreements covering workers engaged in the production of goods for interstate sale are excluded from the operation of the Act. There the Union appealed from an order refusing a stay of proceedings brought by the Company under Sections 301 and 303 of the Taft-Hartley Act to recover damages resulting from a strike in violation of the contract and a secondary boycott. Judge Parker, speaking for a unanimous court, stated:

> "And we think, also, that the learned District Judge was correct in holding that the provisions of the United States Arbitration Act may not be applied to this contract, because it is a contract relating to the employment of workers engaged in interstate commerce, within the clear meaning of the exclusion clause contained in the first section. This is not to say, of course, that such workers and their employers may not agree to arbitrate their differences, but merely that the provisions of the United States Arbitration Act do not apply to their agreements. . . . we think it clear that the excepting clause was intended to apply to the entire act. This becomes even clearer when reference is made to the statute as originally enacted, where the portion containing the definitions and exception is not separately numbered but is manifestly intended to apply to the statute as a whole (43 Stat. 883).
>
> ". . . It is perfectly clear, we think, that it was the intention of Congress to exclude contracts

of employment from the operation of all of these provisions. Congress was steering clear of compulsory arbitration of labor disputes, and unless the excepting clause which we have italicized is applied to the entire act, and not confined to the first section, section 4 would give the court power to force arbitration in any agreement providing for arbitration where there is jurisdiction because of diversity of citizenship or other reasons. Of course, if the excepting clause applies to section 4, it applies also to section 3; for the only alternative to applying it to the entire act is to limit it to section 1. The effect of limiting the excepting clause to section 1 would be merely to exclude employment contracts from maritime transactions and transactions in commerce as defined in the act, so that these would not come within the arbitration agreements made valid and enforceable by section 2, but would leave them, if otherwise valid, to be enforced under the provisions of section 4, the provisions of which are not limited to maritime transactions or transactions in commerce. Whether regard be had to the language of the statute, therefore, or to its reason and spirit and the evident purpose of the excepting clause, it is clear that it is applicable to the entire statute and not merely to the definitions of maritime transactions and commerce."

A unanimous Tenth Circuit followed the *Colonial Hardwood* case in *Mercury Oil Refining Co. v. Oil Workers Union, CIO,* 187 F. 2d 980, 983 (1951), in applying the Act to a collective bargaining agreement.

The Sixth Circuit has in effect reversed the position it took in *Gatliff Coal Co. v. Cox,* 142 F. 2d 876 (1944), in its recent *Hoover Motor Express Co. v. Teamsters*

Union, AFL decision, 217 F. 2d 49 (1954). The *Hoover Motor* case will be discussed hereinbelow, and although the Sixth Circuit now states that subsequent circuits "misconstrued" the *Gatliff* holding, we submit that the reasoning of the *Gatliff* case is still pursuasive.

Gatliff was an action brought by an employee against the defendant coal company seeking a sum which he alleged was due him as wages under the collective bargaining agreement between a coal operators' association and the United Mine Workers of America. Although the court did not expressly state that a collective bargaining agreement was a contract of employment within the meaning of the Arbitration Act, this view was implicit in its decision. The court did say, "Since Appellee was employed by Appellant at the time the collective agreement was entered into . . . and . . . continued in the employ of Appellant . . . *Appellee's rights* arising out of his employment by Appellant and the wages due him, if any, *must be measured by the collective agreement.*" (Emphasis added.)

The Sixth Circuit, then composed of Judges Hamilton, Martin and McAllister, unanimously stated as follows in denying the Company's motion for stay:

> "The office of an exception in a statute is well understood. It is intended to except something from the operative effect of a statute or to qualify or restrain the generality of the substantive enactment to which it is attached and it is not necessarily limited to the section of the statute immediately following or preceding. The scope of the exception or proviso in the statute must be gathered from a view of the whole law, and if the language of the exception is in perfect harmony with the general scope of the

entire statute, the exclusion is applicable to the whole act. It is clear that the exception here in question was deliberately worded by the Congress to exclude from the National Arbitration Act all contracts of employment of workers engaged in interstate commerce. Section 2 of the Act makes valid and irrevocable all arbitration agreements in writing to submit to arbitration future controversies arising out of the contract of which the arbitration agreement was a part. It would be senseless to say that the exclusion from the Act covers the validity of the contract, but excludes the stay provision of Section 3. The reason for the exclusion is applicable to the entire act. The language of the exclusion 'herein contained' is found in the first section of the Act. This section is made up entirely of definitions and exceptions to the operation of the title. 'Herein' as used in legal phraseology is a locative adverb and its meaning is to be determined by the context. It may refer to the section, the chapter or the entire enactment in which it is used. The fact that it was used in the present Act in a section where none of the substantive matter set up in the succeeding sections of the Act appeared must mean that it is to be applied to the whole Act and not to any given section."

The most recent Third Circuit holding on this particular point is in accord. (*Tenney Engineering, Inc. v. United Electrical Workers,* 207 F. 2d 450 (1953).)

The Third Circuit, however, has vascillated in its approach to this problem. In *Donahue v. Susquehanna Collieries Co.,* 138 F. 2d 3 (1943); *Watkins v. Hudson Coal Co.,* 151 F. 2d 311 (1945), cert. denied, 327 U. S. 777 (1946); *Donahue v. Susquehanna Collieries Co.,* 160 F. 2d 661 (1947), and *Evans v. Hudson Coal Co.,* 165 F. 2d 970 (1948), the Third Circuit had held that Section 1 of

the Act related to Section 2 only and had no application to motions for stay authorized by Section 3.

Subsequently the Third Circuit reconsidered the issue and reversed its earlier position holding that the exclusionary clause pertained to the entire Arbitration Act.

Amalgamated Ass'n Street Employees v. Pennsylvania Greyhound Lines, 192 F. 2d 310 (1951);

Pennsylvania Greyhound Lines v. Amalgamated Ass'n Street Employees, 193 F. 2d 327 (1952).

In *Tenney, supra,* the Third Circuit reaffirmed its position that the exclusionary clause is a limitation upon the operation of all sections of the Act citing *Gatliff, Colonial Hardwood* and *Pennsylvania Greyhound, supra.*

Several district courts in the third circuit took their cues from the rule then in effect in that circuit, and as the higher court changed its position, the district courts followed.

Thus in *United Office & Professional Workers v. Monumental Life Inc. Co.,* 88 F. Supp. 602, 604 (E. D. Pa. 1950), the district judge stated that he was compelled to follow the general rule in effect in the third circuit at that time as announced by the *Donahue* and *Watkins* cases, *supra.*

By the same token the Delaware district court in *Ludlow Mfg. & Sales Co. v. Textile Workers Union, CIO,* 108 F. Supp. 45 (1952), was compelled to follow the *Pennsylvania Greyhound* decisions, *supra,* and to deny a motion for stay of proceedings although at the time the matter was argued the rule of *Donahue* and *Watkins* prevailed.

Other districts where there was no controlling circuit decision in effect chose conflicting precedents.

A New York district court in *Lewittes & Sons v. United Furniture Workers, CIO,* 95 F. Supp. 851 (1951), and cited in Brief of Appellants at pages 7 and 8, relied heavily upon the *Monumental Life* case, *supra.*

A California district court, on the other hand, followed the *Colonial Hardwood* case in *Matson Navigation v. National Union Marine Cooks and Stewards,* 22 L. R. R. M. 2138, 10 Lab. Arb. 932 (1948), appeal dismissed 171 F. 2d 179 (9th Cir. 1948).

At one point in time in the Arbitration Act's judicial interpretation the three circuits which had considered the exclusionary clause were in accord that it applied to the entire Act. (*Colonial Hardwood, Gatliff* and *Pennsylvania Greyhound* cases, *supra.*)

Thus the Massachusetts District Court in *Boston & Maine Transp. Co. v. Amalgamated Ass'n Street Employees,* 106 F. Supp. 334 (1952), had an easy task and pointed to the agreement of the circuits on this question in denying a motion for stay of proceedings pending arbitration.

With the decision of the *Mercury Oil* case, *supra,* in 1952, all four of the circuits which had discussed the exclusionary clause agreed that contracts of employment were excluded from the operation of the entire Arbitration Act including Section 3.

In a case note in 51 Mich. L. Rev. 117, 119 (1952), the author stated:

> "It now seems clear that there is no method under existing Federal legislation to enforce, directly or

indirectly, an agreement to arbitrate contained in a collective bargaining agreement. No doubt this result is deducted by the technical rules of statutory construction, the legislative history, and the context applicable to the Arbitration Act."

At present the *Hoover Motor* decision, *supra,* of the Fourth Circuit stands as the lone dissent.

B. A Collective Bargaining Agreement Is a Contract of Employment Within the Meaning of the Exclusionary Clause.

The greatest cause of conflict between the courts is whether a collective bargaining agreement is a contract of employment.

The authorities which state that it is not rely upon a statement taken out of context in *J. I. Case Co. v. NLRB,* 321 U. S. 332 (1944). *Case* is cited solely because of an isolated statement therein that the result of collective bargaining between a union and management is not necessarily a "contract of employment." (Brief for Appellant, p. 6.) Actually that case arose as follows: The employer entered into individual agreements with certain employees, which the NLRB found was a violation of the National Labor Relations Act. The NLRB had obtained a circuit court decree enforcing its order requiring the employer to cease and desist from giving effect to the individual contracts of employment and from making new ones. The writ was granted to review the Circuit Court's decree. The Court affirmed, and it was not necessary to such affirmance that any finding be made that a collective bargaining agreement was not a contract of employment.

What Justice Jackson had reference to in the above quoted statement was simply that the collective bargaining

agreement did not in and of itself give the worker a job. It merely set forth by contract between the union and the company the terms of employment under which each worker would work if, as and when hired. As a matter of fact, Mr. Justice Jackson carefully points out just before the reference quoted above as follows:

> "Contract in labor law is a term the implication of which must be determined from the connection in which it appears."*

The connection in which "contract of employment" appears in the United States Arbitration Act is wholly different from the problem which was before Mr. Justice Jackson in affirming the Seventh Circuit Court's decree enforcing the Board's order.

Certain authorities have neglected to examine into the implication of the term "contract of employment" in connection with its use in the Arbitration Act.

The most recent example is the *Hoover Motor* case, *supra,* where Justices Simons, Allen and Stewart of the Fourth Circuit, none of whom decided the *Gatliff* case, *supra,* emasculated that decision by stating that it had been "misconstrued." The court for its new position cited *Lewittes,* which in turn relied on *Monumental Life,* which in turn relied on *Donahue* and *Watkins,* which in turn were overruled.

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*See *Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 35 L. R. R. M. 2643 (U. S. Supreme Court, March 28, 1955), where Justice Frankfurter speaks of "the difficulties which originally plagued the courts called upon to identify the nature of the legal relations created by a collective contract" and cites in footnote 27 four different legal views on this subject.

Perhaps the entire discussion of the Arbitration Act in the *Hoover Motor* case should be disregarded since the opinion points out that the collective bargaining agreement between the parties did not contain an arbitration clause. Therefore any discussion of the Arbitration Act is mere dictum—a premature attempt by the court to bury *Gatliff* without the benefit of a corpse.

The fallacy of the *Hoover Motor, Lewittes* and *Monumental Life* cases in taking an isolated statement appearing in *Case* and applying it to the Arbitration Act has been pointed out by several able courts.

The Fourth Circuit was asked to reconsider and overrule its *Colonial Hardwood* decision in *United Electrical Workers v. Miller Metal Products, Inc.,* 215 F. 2d 221 (4th Cir. 1954). Although as pointed out at page 4 of Appellant's Opening Brief *Colonial Hardwood* had not expressly considered the distinction between contracts of employment as used in the Arbitration Act and collective bargaining agreements, this distinction was thoroughly discussed and rejected in the *Miller Metal* case. The court stated:

> "We think it equally clear that, even if there had been an agreement to arbitrate the matter involved in the suit, stay of proceedings could not be had under the provisions of the United States Arbitration Act for the reasons set forth in the opinion in the *Colonial Hardwood* case. We went into the matter fully in the decision in that case and nothing need be added to what we said there, except we note that later decisions in accord are *Shirley-Herman Co. v. International Hod Carriers,* 2 Cir. 182 F. 2d 806 and *Amalgamated Association v. Pennsylvania Greyhound Lines,* 3 Cir. 192 F. 2d 310.

"We are not impressed by the argument that our holding in the *Colonial Hardwood* case must be overruled because of the distinction drawn between contracts of employment and collective bargaining agreements in *J. I. Case Co. v. N. L. R. B.,* 321 U. S. 332. As pointed out by the Court of Appeals of the Third Circuit in the *Pennsylvania Greyhound* case, *supra,* it was necessary in the *J. I. Case* decision to make a distinction which would have no relevance to interpreting the Arbitration Act. It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute. The terms of the collective bargaining agreement become terms of the individual contracts of hiring made subject to its provisions and the controversies as to which arbitration would be appropriate arise in almost all instances, not with respect to the individual contracts of hiring, but with respect to the terms engrafted on them by the collective bargaining agreement. It is with respect to the latter that objection arises to the compulsory submission to arbitration which the Arbitration Act envisages. No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions grafted on them by the collective bargaining agreements."

The first *Pennsylvania Greyhound* case, *supra,* 192 F. 2d at 313, states:

"Our attention has been directed to Justice Jackson's statement in *J. I. Case v. N. L. R. B.* (1944), 321 U. S. 332, 334-35, to the effect that collective

bargaining agreements are not contracts of employment. But this reference is inapposite because the factual context of that case necessitated the drawing of a distinction between collective as opposed to individual contracts of employment. . . . There is no similar compulsion in the context of the Arbitration Act. Contrariwise, the most plausible explanation for the exclusion of contracts of employment from the reach of the Act supports a construction that would give to the words their normally comprehensive significance. Widespread dissatisfaction with compulsion from the federal bench in labor disputes during the era in which the statute was passed[6] was paralleled by the existence of administrative rather than judicial machinery for settlement of labor disputes in the case of both 'classes of workers' specified in Section 1. See 17 Stat. 267 (1872), 46 U. S. C. A. 651 *et seq.* (1944) (seamen); 38 Stat. 103 *et seq.* (1913); 41 Stat. 469 *et seq.* (1920); 44 Stat. 587 (1926), 45 U. S. C. A. Par. 151 *et seq.* (1944) (railroad employees). For Congress to have included in the Arbitration Act judicial intervention in the arbitration of disputes about collective bargaining involving these two classes would have created pointless friction in an already sensitive area as well as wasteful duplication. It is reasonable, therefore, to believe that the avoidance of an undesirable consequence in the field of collective bargaining was a principal purpose of excepting contracts of employment from the Act. In these circumstances the phrase 'contracts of employment' should be construed to include collective bargaining agreements."

"[6]The familiar Norris La Guardia Act, 47 Stat. 70 (1932), 29 U. S. C. Par. 101 (1946), was the national legislative culmination of this dissatisfaction."

In *Ingersoll Products Div., Borg-Warner Corp. v. United Farm Workers, UE,* 34 L. R. R. M. 2174 (N. D., Ill., 1954), the court rejected the argument that the statement of Justice Jackson, cited by Appellant at page 6 of its Opening Brief, is authority for the proposition that the term "contract of employment" in the exclusionary clause does not embrace collective bargaining agreements. The court stated that the discussion of a collective trade agreement by Justice Jackson, 321 U. S. at 355,

> "strengthens the conviction that a collective bargaining agreement is an employment contract within the ambit of the Arbitration Act. . . . It would be a strange and forced refinement, in the context of the Arbitration Act, to exclude collective bargaining agreements from the designation 'contracts of employment.'
>
> ". . .
>
> "Opinion is somewhat divided on this issue, but the weight of reason and authority is on the side of holding that a collective bargaining agreement is within the purview of the exclusion expressed in Section 1 of the Act." (Cases cited.) (34 L. R. R. M. at 2176.)

C. The Exclusionary Clause Was Intended to Apply to Collective Bargaining Agreements and Not to Contracts for Personal Services.

The *Hoover Motor, Lewittes* and *Monumental Life* cases, *supra,* state that the exclusionary clause was intended to avoid the specific performance of contracts for personal services and was not intended to apply to collective labor agreements.

This reasoning is fallacious for obvious reasons. First, the language of the exclusionary clause names groups

of workers, not individual workers. It pertains to contracts of employment of "seamen," "railroad employees" or other "class of workers" engaged in commerce.

Secondly, hiring contracts of individual seamen or railroad employees or employees in any mass industry do not contain arbitration clauses. On the contrary, arbitration is resorted to by parties of roughly comparable economic power. Only organized employees could force an employer to submit disputes to arbitration. Thus, Congress would have been doing an idle act to exclude from the Arbitration Act contracts of individual workers which by their very nature do not contain arbitration clauses. Note, 63 Yale L. J. 729, 731 (1954).

A third reason is discussed in Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes,* 33 Columb. L. Rev. 1366, 1368 (1933):

> "There are two types of labor agreements: the individual contract and the collective, or trade, agreement. Arbitration is rare in individual contracts of employment, though it exists spasmodically in certain of the companies having company unions or 'employee representation.' A general arbitration clause in an individual employment contract would mean arbitration of such questions as the right to discharge,[16] which employers are unwilling to leave to the judgment of outside parties unless forced to do so by a trade union. Intervention of the latter, of course, means the practical end of the individual contract, and the insertion of a trade agreement in its place. At that point, 'industrial arbitration' comes into effect."

"[16]Employers refused to arbitrate the question of discharge until the strong intervention of trade unions. See Estey, THE LABOR PROBLEM (1928) 230 ff. . . ."

D. The Company's Employees Are "a Class of Workers Engaged in Interstate Commerce" Within the Meaning of the Exclusionary Clause.

The circuitous path taken by the Third Circuit in exploring the passages of the Arbitration Act we have already traced.

The *Tenney* case, *supra,* is that court's latest exposition on the Act. Although the court held that the exclusionary clause applied to the entire Act, and that collective bargaining agreements were contracts of employment within the meaning of the exclusionary clause, it sapped the vitality of this holding by declaring that the phrase "workers engaged in foreign or interstate commerce" contained in the exclusionary clause was intended to cover only employees engaged in the transportation of goods in interstate or foreign commerce and did not include employees who work in an establishment manufacturing goods for interstate sale.

The court's decision is based on a technical construction of the phrase "engaged in foreign or interstate commerce" which has no place either in logic or history.

The court cites the interpretation of the United States Supreme Court in *Shanks v. Del. L. & W. Ry.,* 239 U. S. 556, 558 (1916), of that portion of the Federal Employers' Liability Act of 1908 which applied to a railroad employee injured "while he is employed by such carrier . . . in such . . . commerce." The *Shanks* case held that this language included only employees engaged in interstate transportation or in work so closely related to it as to be practically a part of it. The Third Circuit says that since almost exactly the same phrase-

ology is employed in the Arbitration Act of 1925 Congress must have had in mind the *Shanks* construction.

Such a vague notion of Congressional intent should not govern the phrase "engaged in foreign or interstate commerce." It can hardly be said that Congress was using this phrase as a word of art in 1925.

The Appellant states, "It is significant that the Arbitration Act does not use terms such as 'affecting commerce' (Taft-Hartley Act), or 'in the production of goods for commerce' (Fair Labor Standards Act)." (Brief for Appellant, p. 8.) We find no such significance. Not until ten years after the passage of the Arbitration Act, did Congress first attempt to regulate labor relations in industries affecting commerce. N. L. R. A. 1935 (Wagner-Connery Act), 49 Stat. 449, 29 U. S. C. Secs. 151-166. The phrase "affecting commerce" was first construed in *N. L. R. B. v. Jones & McLaughlin Steel Corp.,* 301 U. S. 1, 31 (1937). The phrase "engaged in the production of goods for commerce" was used in the Fair Labor Standards Act of 1938 and was construed in *A. B. Kirschbaum Co. v. Walling,* 316 U. S. 517 (1942), and *Borden Co. v. Borella,* 325 U. S. 679 (1945).

It is pure speculation to hold that Congress had such precise distinctions in mind a decade before either the National Labor Relations Act or the above cited decisions of the United States Supreme Court.

In addition the *Tenney* case in effect negatives the words "any other class of workers engaged in foreign or interstate commerce" in the exclusionary clause by applying the rule of *ejusdem generis* and stating,

> "The draftsman had in mind the two groups of transportation workers as to which special arbitra-

> tion legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers." (207 F. 2d at 452.)

This statement contains an unwarranted assumption that the similar classes of workers mentioned were also covered by such arbitration legislation.

The Fourth Circuit in *United Electrical Workers v. Miller Metal Products, Inc., supra,* 215 F. 2d at 224, stated,

> "Nor are we impressed by the argument that the excepting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation in interstate commerce, as held by the majority in *Tenney Engineering Co. v. United Electrical R. & M. Workers,* 3 Cir. 207 F. 2d 450, 21 L. A. 260. As we pointed out in *Agostini Bros. Building Corp. v. United States,* 4 Cir. 142 F. 2d 854, Congress in enacting the arbitration act was endeavoring to exercise the full extent of its power with relation to the subject matter. There is no reason to think that it was not intended that the exception incorporated in the statute should not reach also to the full extent of its power."

Ingersoll Products Div., Borg-Warner Corp. v. United Farm Workers, UE, supra, (34 L. R. R. M. at 2176), also rejects the distinction made in *Tenney.*

Harris Hub Bed and Spring Co. v. United Electrical Workers, UE, 121 F. Supp. 40 (M. D. Pa. 1954), cited at page 9 of Appellant's opening brief, expressly follows the *Tenney* case, *supra,* and is subject to the same criticism.

E. The Legislative History of the United States Arbitration Act Compels the Conclusion That Collective Bargaining Agreements Are Excluded From the Ambit of the Act.

1. Legislative History Must Be Examined to Ascertain the Intent of Congress.

The ambiguity of the phrase in the exclusionary clause which reads "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" has been demonstrated in the above discussion.

In *United States v. Local 807, Int'l Brotherhood of Teamsters,* 315 U. S. 521 (1942), the Supreme Court construed an exclusionary clause in the Anti-Racketeering Act of 1934 (48 Stat. 979, 18 U. S. C. Sec. 420a). The provision excluded from the Act "the payment of wages by a bona-fide employer to a bona-fide employee."

Just this court has before it three different interpretations of the exclusionary clause of the Arbitration Act, the Supreme Court had before it three varying constructions of the exclusionary clause of the Anti-Racketeering Act: one by the majority of the lower court, a second by the Government and a third from the dissenting judge in the Court of Appeals.

Confronted with these various interpretations, the court said it had to turn for guidance to the legislative history of the statute. It then relied heavily to ascertain the aim and intent of the law upon expressions uttered by the A. F. L. against its application to labor after the bill had passed the Senate and before it was redrafted by the Department of Justice.

Similarly when the Arbitration Act was being considered by Congress:

> "Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.'" 48 A. B. A. Rep. 287 (1923).

The Supreme Court in construing the word "territory" in the Sherman Act noted:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed."
>
> *Puerto Rico v. Shell Co.,* 302 U. S. 253, 258 (1937).

Accord:

> *Vermilya-Brown Co. v. Connell,* 335 U. S. 377, 386 (1948);
>
> *Penn. Mutual Life Ins. Co. v. Lederer,* 252 U. S. 523, 537 (1920). ("The legislative history of an act may, where the meaning of the words used is doubtful, be resorted to as an aid to construction," per Brandeis, J.)

2. Explanations Given on the Floor of Congress Are Entitled to Weight in Ascertaining the Purpose of the Act.

Chief Justice Biggs, concurring in the *Tenney* case, *supra,* in refusing to give weight to legislative history, cites *Duplex Printing Press Co. v. Deering,* 254 U. S. 443 (1921), and *United States v. Kung Chen Fur Co.,* 188 F. 2d 577 (1951).

The *Duplex* case, *supra,* states that explanatory statements in the nature of a supplemental report made by a committee member in charge of a bill in the course of its passage may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. (254 U. S. at 474, 475.) The *Kung Chen* case, *supra,* also recognizes this rule. (188 F. 2d at 584.)

The rule is succinctly stated in *United States v. Great Northern Ry.,* 287 U. S. 144, 154 (1932):

> "In the aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."

In *Wright v. Mountain Trust Bank,* 300 U. S. 440, 463 (1937), Justice Brandeis cited *Duplex* for the above proposition and also stated in footnote 8:

> "Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation . . . to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology."

The rule has been liberalized in modern day. For example, in *United States v. CIO,* 335 U. S. 106, 112 (1948), the court stated:

> "The purpose of Congress is a dominant factor in determining meaning. . . . Nor, where doubt exists, should we disregard informed congressional discussion."

The case of *Levy v. Superior Court,* 15 Cal. 2d 692, 705 (1940), cited at page 11 of Appellant's Opening Brief is not in point. First a proviso expressly excluding collective bargaining agreements was tendered to the California Legislature but not included in the Act. Secondly California had a legislative and judicial history pertaining to the definition of "labor." Thirdly the clause in the *Levy* case is substantially different from the instant case.

3. The Purpose of the Lawmakers Was to Frame a Commercial Rather Than a Labor Arbitration Act.

The Arbitration Act should be "read in the light of the purpose it was intended to subserve and the history of its origin."

> *United States v. Louisville & Nashville R. R.,* 236 U. S. 318, 333 (1915).

The Act was drafted by the Committee on Commerce, Trade and Commercial Law of the American Bar Association and sponsored by the A. B. A. (H. R. Rep. No. 96, 68th Cong., 1st Sess., p. 1.)

The history of the A. B. A.'s connection with the Act is set forth in 50 A. B. A. Rep. 357-362 (1925). All references contained in the A. B. A. history refer to the Act as one dealing with commercial arbitration.

The Arbitration Act in the form set forth in 47 A. B. A. Rep. 315 was introduced in the 67th Congress, 4th Session on December 20, 1922, by Senator Sterling in the Senate and on the same day by Congressman Mills in the House. The bill received the support of the National Association of Credit Men and the New York Chamber of Commerce. It was endorsed by some 46 other organizations, all of which were of a business or commercial nature with the possible exception of the Arbitration Society of America, New York City, and the Building Trades Employees' Association of the City of New York. 48 A. B. A. Rep. 286-287 (1923).

Credit for the passage of the bill through the Senate was given to Charles L. Bernheimer, Chairman of the Committee on Arbitration of the Chamber of Commerce of the State of New York, who also represented a large number of commercial organizations throughout the country. 50 A. B. A. Rep. 357 (1925).

The A. B. A. resolution after the passage of the Act makes "due acknowledgement to the commercial organizations throughout the United States for their splendid cooperation in support of the Act." 50 A. B. A. Rep. 84, 353 (1925).

The chairman of the American Bar Association Committee on Commerce, Trade and Commercial Law testified before the Senate subcommittee which considered the bill:

> "It was not the intention of the bill to make an industrial arbitration in any sense."
>
> Hearing before Subcommittee of Committee on the Judiciary, United States Senate, on S. 4214, 67th Cong., 4th Sess., p. 9 (1923).

The tentative draft did not contain the exclusionary clause. 46 A. B. A. Rep. 359 (1921). As previously pointed out, the Act was later amended to exclude contracts of employment from its operation because of strenuous objection by the president of the Seamen's Union. 48 A. B. A. Rep. 287 (1923).

It may be safely assumed that the Seamen's Union was concerned with arbitration provisions contained in collective bargaining agreements rather than in individual agreements of employment—if any existed at all.

Gordon, in *International Aspects of Trade Arbitration,* 11 A. B. A. J. 717, 718 (1925), observed:

> "No piece of *commercial legislation* comparable with it in importance and value has been passed by Congress for a quarter of a century." (Emphasis added.)
>
> ". . .
>
> "The proviso in it, which excepts from its operation workers' agreements, while regarded by its framers as no improvement, was suggested by Herbert Hoover, Secretary of Commerce, a stanch (*sic*) friend of the measure, as a wise sop to the Cereberus of labor."

The proponents of the bill feared additional labor opposition to that of the Seamen's Union.

> "Labor opposition was based on a feeling that specific performance of arbitration agreements in labor contracts resembled compulsory arbitration, and a fear that it might lead to forced arbitration of disputes of new contract terms."
>
> Comment, 28 N. C. L. Rev. 225, 228 (1950).

Turning to the discussion of the bill in Congress we find that there, too, it was consistently referred to as a commercial arbitration act.

On February 5, 1924, when asked for an explanation of the bill, Representative Graham of Pennsylvania stated:

> "This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in *commercial contracts* and *admiralty contracts*—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to . . . It creates no new legislation, it grants no new rights, except a remedy to enforce an agreement in *commercial contracts* and *admiralty contracts.*" (Emphasis added.) 65 Cong. Rec. 1931.

On December 30, 1924, the bill came before the Senate. Senator Robinson asked to be advised as to the purpose of the bill. Senator Walsh of Montana replied, ". . . The *business* interests of the country find so much delay attending the trial of lawsuits that there is a very general demand for a revision of the law in this regard." 66 Cong. Rec. 984. (Emphasis added.)

The bill as amended by the Senate came before the House on February 4, 1925. Mr. Graham was asked to identify the proponents of the bill. He replied that the proponents of the bill were "commercial." 66 Cong. Rec. 3004.

The above legislative history clearly shows that the purpose of Congress was to enact a commercial rather than an industrial arbitration act.

The bridge between commercial and industrial arbitrations is a wide one.

> Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes,* 33 Columb. L. Rev. 1366 (1933);
>
> 6 Williston, Contracts, Sec. 1930 (rev. ed., 1938).

As pointed out by District Judge Tolin [R. 28], when Congress intends to enact labor legislation, that is, mechanics to enforce industrial arbitration, it will spell out its intent in no uncertain terms, such as it did in Railway Labor Act. (44 Stat. 577, as amended by 48 Stat. 1185 and by 49 Stat. 1189, 45 U. S. C. Chap. 8.)

Lewittes & Sons v. United Furniture Workers, CIO, supra, cited at page 7 of Appellant's Brief, and *United Office Workers CIO v. Monumental Life Ins. Co., supra,* relied on by *Lewittes,* in so far as they construe 1925 legislation by examining current legislation and purported public policy are enactments of judicial legislation. The alleged current attitude of Congress toward the encouragement of labor arbitration as exemplified by the Taft-Hartley law has no bearing on Congressional intent in legislation passed more than 20 years earlier.

> *Cf.* Brandeis, J., in *Penn. Mutual Life Ins. Co. v. Lederer, supra,* at 538.

After the passage of the Arbitration Act commentators recognized that it did not apply to the arbitration of labor disputes but was confined to commercial disputes:

> Baum and Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts,* 8 N. Y. U. L. Q. Rev. 428 (1931);

Fraenkel, *The Legal Enforceability of Agreements to Arbitrate Labor Disputes,* 1 Arb. J. 360, 361 (1937);

Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes,* 33 Col. L. Rev. 1366 (1933);

Simpson, *Specific Enforcement of Arbitration Contracts,* 83 U. Pa. L. Rev. 160, 168 (1934);

Sturges, Commercial Arbitration and Awards, Sec. 32 (1930).

In light of these observations some significance should be attached to the fact that Congress reenacted the Arbitration Act into positive law in 1947 without any change in substance.

More recent comments in the law reviews have recommended that the Arbitration Act be amended so that its scope would encompass written agreements to arbitrate labor disputes.

Comment, 28 N. C. L. Rev. 225, 228 (1950);

Note, 40 Va. L. Rev. 209, 211 (1954);

Note, 102 U. Pa. L. Rev. 558, 563 (1954).

Actually, legislation was proposed by Senator Maloney on March 9, 1942, to bring collective bargaining agreements within the ambit of the Act. S. 2350, 77th Cong., 2d Sess. (1942). He incorporated the bill in a memorandum which sets forth the general purposes of the proposed amendment as follows:

> "The United States Arbitration Act as originally enacted on February 12, 1925 was designed to facilitate the use of arbitration in settling *commercial* disputes." (Emphasis added.) 88 Cong. Rec. 2071.

"Aside from proposed amendments designed merely to clarify the provisions of the Act or to remove legal technicalities that have developed in litigation under the Act since 1925 there are the following substantial proposed amendments:

"1. Extension of the Act to embrace written agreements to arbitrate labor controversies.

"Just as the present Act was designed to overcome the common law rules of 'irrevocability' and 'non-enforceability' of written agreements to arbitrate commercial controversies arising between the parties, so by Section 2A, as proposed, would the Act be extended to written agreements to arbitrate labor controversies." *Id.* at 2072.

The explanation inserted in the Congressional Record was taken from an article by Wesley A. Sturges,* *Proposed Amendment of the United States Arbitration Act,* 6 Arb. J. 227 (1942).

The revised Act proposed by Senator Maloney deletes the exclusionary clause. 88 Cong. Rec. 2073. Added is Section 2A entitled "Agreements to Arbitrate Labor Controversies":

"An agreement in writing between a labor organization, committee, or other representative acting in behalf of two or more employees and any employer, employers, or association or group of employers engaged in a maritime transaction or in commerce to settle by arbitration any controversy or controversies

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*Chairman of the Board of Directors of American Arbitration Association, President of the Association of American Law Schools, Professor of Law and former Dean of the Yale Law School and former Chairman of the Law Committee of the American Arbitration Association.

thereafter arising between them, including any controversies concerning, past, present or future rates of pay, wages, hours of employment, and any other and different past, present, or future terms or conditions of employment of any employee or employees of such employer or employers, or an agreement in writing between two or more labor organizations to settle by arbitration any controversy or controversies thereafter arising between them which shall affect any employer engaged in any maritime transaction or in commerce, or an agreement in writing by such parties to submit to arbitration any such existing controversy, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the avoidance of contracts generally. No agreement for arbitration shall qualify under this section unless the parties shall provide therein what district court of the United States shall have jurisdiction of any and all proceedings under this act with respect to such agreement and any arbitration proceedings and award thereunder. Except as herein otherwise expressly provided, the District court of the United States so designated by the parties shall have exclusive jurisdiction of all such proceedings."

Ibid.

The same amendments to the Arbitration Act were introduced by Representative Kefauver in H. R. 7163 on June 1, 1942. *Id.* at 4785.

No further congressional action was taken by either the House or the Senate in regard to the amendment of the Arbitration Act. It was reenacted in its original form in 1947.

4. The Context of the Exclusionary Clause and the Circumstances Under Which the Words Contained Therein Were Employed Show That the Act Was Not Intended to Apply to Collective Bargaining Agreements.

When we consider that the Arbitration Act was passed in 1925 we must bear in mind that not only was union labor but management as well opposed in principle to the idea of a third party dictating to them what should or should not be done under a collective bargaining agreement. Even though the parties had entered into an agreement including arbitration, either side may well have felt that such provision was forced upon it as a condition to obtaining the rest of the contract. Either the union or the employer or both may well have preferred not to have to be forced into arbitration if the dispute should arise. In 1925 management, of course, jealously guarded its management prerogatives and was undoubtedly extremely antagonistic toward the idea that it could be compelled to permit an arbitrator to take over these prerogatives by force of a court decision.

Likewise it should be remembered in 1925 that the unions would be just as antagonistic toward being compelled to arbitrate a dispute. At that time a no-strike clause was rarely, if ever, agreed to by a union in a collective bargaining contract. If the union were to be compelled to arbitrate under the Arbitration Act, this would in effect remove its right to strike. It is highly unlikely that the unions would have urged then the modern day policy now suggested for the construction of the Arbitration Act.

II.

Even if the United States Arbitration Act Were Applicable, the Union's Motion to Stay Must Be Denied Because the Issue Presented by the Pleadings Herein Is Not Arbitrable.

A. Only Arbitrable Issues May Be Referred to Arbitration Under the Act, and This Court Should Affirm the Order of the Lower Court if the Dispute Between the Parties Is Not Referable to Arbitration.

Even if the Court rules that Section 3 applies to collective bargaining agreements, the suit may be stayed only if "the court in which such suit is pending" is "satisfied that the issues involved in such suit . . . is referable to arbitration under" the agreement between the parties. (United States Arbitration Act, Sec. 3.)

In his opinion below District Judge Tolin having found that the contract involved in this action was specifically excluded from the provisions of the Arbitration Act found it unnecessary to decide arbitrability [R. 27]. His failure to rule on this issue does not, however, bar this Court from affirming on the ground that the issue is not arbitrable. This Court has held that an appellate tribunal may affirm a case on grounds other than those which prompted the judgment below.

Commissioner v. Bryson, 79 F. 2d 397, 402 (1935);

Commissioner v. Stimson Mill Co., 137 F. 2d 286, 287 (1943);

Kishan Singh v. Carr, 88 F. 2d 672, 678 (1937).

As stated by the Sixth Circuit in *Cold Metal Process Co. v. McLouth Steel Cor.,* 126 F. 2d 185, 189 (1942), ". . . the appellee may urge, or the appellate court *sua sponte* may consider any theory, argument or reason

in support of a decision of a lower tribunal regardless of whether or not it applied that theory." (Cases cited.)

Appellee contends that since the issue of damages resulting from a strike in breach of the contract is not arbitrable, this Court should affirm the District Court.

B. Only "Grievances" Are Subject to Arbitration, and the Employer Cannot File a Grievance.

1. A Company "Grievance" Is Not Permitted by the Terms of the Contract.

Article XII of the agreement, entitled "Arbitration," provides that, "any and all *grievances* that cannot be amicably adjusted between the Union Representative and the Employer shall be referred to an impartial board for arbitration." [R. 20.] (Emphasis added.)

> "In general, a word used by the parties in one sense is to be interpreted as employed in the same sense throughout the writing in the absence of countervailing reasons. *'Noscitur a Sociis'* is an old maxim which summarizes the rule both of language and of law that the meaning of words may be indicated or controlled by those with which they are associated." 3 Williston, Contracts, Sec. 618 (rev. ed. 1936.)

For a definition of the term "grievance" we refer to Article VII of the agreement entitled "Disputes, Grievance, Union Representation Thereof." Paragraphs 1 and 2 contain employer proscriptions. Paragraph 2 further provides for the initiation by the employee of the grievance machinery. There is nothing in Article VII which directly or indirectly permits the employer to file a grievance.

The only reference to commencing grievance procedure provides for the employee taking up the matter. Paragraph 2 says:

> "Any *employee* . . . shall make his claim to the union . . . upon receipt of the employee's claim, the union shall inform the employer, and grievance procedure shall be instituted promptly." (Emphasis added.)

Also significant is the fact that Article VII is entitled "Disputes, Grievance, Union Representation Thereof." This would seem to indicate that the Union is the representative which carries forward disputes and grievances. This is buttressed by the fact that Article XII provides for amicable adjustment of grievances between the "union representative" and the employer.

Absurd results flow from requiring the filing of a grievance by management under this contract. Every complaint of the employer would have to be reduced to a grievance (including arbitration) before the employer could act. This could mean that the employer could not without union consent discipline, demote, discharge, layoff or exercise any of the other many necessary acts for efficient management—indeed, any management! The grievance and arbitration procedure could involve weeks and months, and if appealed to court, even years.

What the contract does, in fact, permit is for the employer to take whatever action it feels is appropriate so long as such action is not expressly prohibited by the contract, such as a lockout, when an employee or the union has violated the agreement. If the employer should see fit not to commence a potential war by discharging an employee or employees because of acts of such employees

dictated and directed by the union, but rather to seek the peaceful solution of a determination by the court, it hardly lies in the mouth of the union to say that the employer should have discharged the workers instead of suing the union for damages arising out of the activities of these workers in violation of the contract and as directed by the union.

2. A Company "Grievance" Is an Anomaly in the Field of Labor Relations.

"Grievance" has historically meant a complaint by an employee concerning either working conditions or actions taken by the employer, such as denying him a leave of absence, a wage increase or a promotion or unjustifiably discharging him. Classically it has not referred to complaints by the employer. Complaints by the employer are exercised by action. Thus the employer has always had the right to discharge an employee, to lay him off, to deny him a wage increase, to deny him a leave of absence, or the like. When the employee is dissatisfied with the action of the employer he may then make his claim through what has been known as a "grievance."

Therefore, Article XII means that grievances or complaints *only* by employees may be arbitrated if no satisfactory solution is obtained through the grievance procedure.

Professors Gregory and Katz have stated:

> "An integral part of the modern collective agreement is a grievance procedure—a device for the settlement of claims arising from alleged violations of contract provisions. Primarily this procedure is set up to handle the grievances of particular employees or groups of employees who complain that they have

in some way been deprived of certain rights guaranteed to them under the terms of a contract. It is also geared to process claims which a union may raise on its own behalf, in furtherance of its own separate interests in contradistinction to those of the employees whom it represents. *The prosecution of employer grievances under this procedure, however, is usually not provided for and is ordinarily not thought necessary.*" (Emphasis added.)

GREGORY & KATZ, LABOR CASES, MATERIAL AND COMMENTS 1197 (1948).

It is difficult to find many cases dealing with this problem since it has always been assumed that the employer does not and as a practical matter could not file a grievance. Nevertheless, the authors did find two cases dealing with the problem.

In *Wilson & Company, Inc.,* an arbitration decision by Joseph Lohman, 1 Lab. Arb. 450 (1946), the company alleged a violation of the contract by the union in the latter's arbitrary action in the sharpening of knives. The contract contained a somewhat usual type of grievance procedure in which the arbitrator was unable to find any direct reference to the right of the employer to file a grievance. Accordingly, it was held that the employer had no right to file a grievance.

A highly significant decision was rendered during World War II by the War Labor Board, which was established by Presidential Directive Order pursuant to legislation. Its purpose was to keep industrial peace almost at all costs in view of the no-strike and no-lockout pledge of labor and management. Included in the jurisdiction of this Board was the power to make a contract where the parties were unable to reach an agreement. In *American Chain*

and Cable Co., 26 War Lab. Rep. 761 (1945), the company proposed that the grievance procedure be made available to it for the presentation and settlement of its grievances under the terms of the contract. The company wanted the clause in order to avoid the risk of work stoppages. The company said it had reason to be fearful of work stoppages because the employees were being encouraged by the union to disobey the company directions rather than to file grievances. It concluded that the availability of the grievance procedure to both parties was necessary and fair. The union opposed the inclusion on the ground that management had a positive right to cause the plant to function and to direct the working force. If the union wished to protest the exercise of a particular right, the grievance procedure was available to it only as a negative remedy. Such similar positive right of action was not available to the union, and, therefore, rights similar to the union's ought not to be given to the company. The War Labor Board upheld the union and refused to allow the company to process grievances. It said that the company's grievances would necessarily be somewhat vague, and that its requests would be more like a declaratory judgment.

In *Ingersoll Products Div., Borg-Warner Corp. v. United Farm Workers, UE, supra,* the provision for arbitration in the agreement before the court was one of four steps provided for the settlement of grievances.

The contract defined the word grievance as follows:

> "A grievance is a difference of opinion as to the meaning and application of the provisions of the Agreement, or *as to the compliance of either party hereto* with any of its obligations under this Agreement." (Italics supplied by court.)

The first three steps in the grievance procedure set up a routine of company and union conferences. Step 4 provided that the grievance could be appealed to arbitration "in the event the answer of the Works Manager or his designated representative on a particular grievance is not satisfactory . . ."

The court said, "The imperative condition for invoking arbitration is an unsatisfactory answer from the Works Manager to a complaint by the Union or its member."

The Union contended that the company could refer to arbitration its claim for damages for breach of the no-strike clause, basing its contention on the italicized portion of the definition of a grievance set forth above.

The court rejected this contention, stating that arbitration could be invoked only in the event that the Works Manager gave an unsatisfactory answer to the Union and that this condition was "so definite and inflexible that it cannot be made to yield to an ambiguous overstatement in the definition of a grievance." (34 L. R. R. M. at 2177.)

In *Square D Co. v. United Electrical Workers,* 123 F. Supp. 776 (E. D. Mich., 1954), a motion to stay proceedings pending arbitration was denied. The defendants relied on that portion of the contract which provided for a five-step grievance procedure. Step 1 provided: "The aggrieved employee shall endeavor to adjust his or her grievance with the department foreman . . ." By step 2 the employee's grievance proceeded to the chief steward, by step 3 to the shop committee, by step 4 to the grievance meeting, and under step 5: "If the grievance remains unsettled after the above procedure has been

complied with, the grievance may be referred by the Union or the company to a board of arbitrators."

The district judge stated:

> "It is to be noted that the entire procedure is geared to adjust grievances of employees and that it is completely silent as to any possible grievances by the employer. If the last paragraph, on which defendants so strongly rely, includes within its ambit claims by the employer for breach of contract, how will it proceed? It is not an employee and it would be absurd to suggest that it should initiate a grievance or complaint with the shop foreman, yet, under Sec. 5, it can proceed to arbitration only after 'the above' procedure has been complied with . . .
>
> "The crux of plaintiff's claim in the present suit is the fomenting and inciting of strikes by the Unions and officials and a claim for damages resulting from such alleged acts is obviously not covered by the agreement. The parties to the agreement having failed to provide for this contingency in their agreement, neither party can now urge arbitration as a condition precedent to filing of suit for breach of the contract by reason of any acts such as are complained of in the pleading." (123 F. Supp. at 783.)

In *West Texas Utilities Co. v. NLRB,* 206 F. 2d 442, 446 (D. C., Cir. 1953), (Cert. denied 346 U. S. 855 (1953), the court held that fixing wages or rates of pay for a large percentage of employees in a certified bargaining unit was not an adjustment of a "grievance" within the meaning of Section 9(a) of the Taft-Hartley Act. The court stated:

> "Section 9(a) of the Act makes a duly certified union the exclusive bargaining representative for all employees of an appropriate unit with respect, *inter*

> *alia,* to 'rates of pay, wages, hours of employment, or other conditions of employment' although it permits 'any individual employee or a group of employees * * * to present grievances to their employer and to have such grievances adjusted * * * without the intervention of the (exclusive) bargaining representative.' Although any grievance may be a subject of collective bargaining, not all subjects of collective bargaining are grievances. As we view the word 'grievances' it does not encompass, for example, the setting of wage rates for a large percentage of the employees in a certified bargaining unit. The word 'grievances,' in the field of industrial relations, particularly in unionized companies, usually refers to 'secondary disputes in contrast to disagreements concerning broad issues such as wage rates, hours and working conditions.' "

The Fifth Circuit in *Hughes Tool v. NLRB,* 147 F. 2d 69, 72 (1945), in construing the National Labor Relations Act, said:

> ". . . 'grievances' . . . are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected."

Incidentally, in the National Labor Relations Act, as amended by the Taft-Hartley Act, the only reference to a grievance is that of an employee. Section 2(11) defines a supervisor as one with certain authority in the interest of the employer to carry on certain functions in connection with employees or "to adjust their grievances . . ." Section 9(a) provides that "any individual employee or a group of employees shall have the right to present grievances to their employer . . ."

In *Elgin, J. & E. Ry. v. Burley,* 325 U. S. 711, 723 (1945), the United States Supreme Court distinguished disputes concerning the making of collective agreements and disputes over grievances under the Railway Labor Act of 1934:

> "In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment . . .
>
> "The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment."

As pointed out by Justice Frankfurter in *Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp., supra,* the unions were quick to amend their constitutions in order to avoid the definition of the word "grievance" in the *Elgin* case, *supra.* In footnote 28 of the opinion Justice Frankfurter cites action taken to this

effect by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen. Similarly, the Union in the case at bar could have negotiated for an expanded meaning of the word grievance or a broader arbitration clause in the collective bargaining agreement herein.

The Sixth Circuit in the *Hoover Motor* case, *supra,* relying upon *Elgin* and *West Texas Utilities, supra,* held:

> "In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance." (217 F. 2d at 54.)

C. Damages Resulting From the Union's Conduct in This Case Do Not Create an Arbitrable Issue.

The controlled kill imposed by the Union and followed by the employees is a violation going to the essence of the contract. The contract gives to the company exclusive authority to determine the amount of work to be done by each employee. The direct obligation of the employee to follow the reasonable directions and instructions of the company (including those relating to the rate or amount of production) is contained in Article VII of the collective bargaining agreement [R. 15]. Paragraph 5 directly provides for management to determine "bad workmanship, misconduct, failure to follow instructions, or any breach of discipline . . ."

Paragraph 4 provides that the employee may issue rules for the purpose of maintaining "maximum efficiency."

Article XII expressly prohibits a strike during the term of the agreement [R. 20]. An arbitrary limitation of production determined not by the Company but by the

Union and its members employed by the company, is a slowdown which violates the prohibition against strikes.

> Shulman and Chamberlain, Cases on Labor Relations, 1155 ff. (1949).

See:

> *In re Textile Workers Union and Personal Products Corp.,* 108 N. L. R. B. No. 109, 34 L. R. R. M. 1059, 1063 (1954).

The right to discharge for slowdowns both under the Taft-Hartley law and under union contracts is well established.

> *Elk Lumber Co.,* 91 N. L. R. B. 333, 26 L. R. R. M. 1493 (1950);
>
> *Goodyear Tire and Rubber Co.,* 18 Lab. Arb. 557 (1952);
>
> *National Machine Co.,* 5 Lab. Arb. 97, 99 (1946).

Although the definitions contained in the Taft-Hartley law are not binding upon either the Company or the Union, certainly the definitions contained therein are entitled to great weight as generally accepted definitions. The term "strike" in Section 501(2) of Labor-Management Relations Act, 1947, "includes any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." The editors of Commerce Clearing House, Inc., one of the few publishers of labor relations matters, state:

> "This definition by and large conformed to that used by persons informed in the field of labor relations." C. C. H., Inc., Labor-Management Relations Act, 1947 With Explanation 90 (1947).

Aside from contract language, it is apparent that responsibility for production must rest with management unless there is some unusual clause in the contract qualifying that right. Someone in authority must determine the employee's responsibility. The proper party obviously is the employee's supervisor, that is, the employer.

Thus, it is provided by law that an employee is required to carry out the reasonable directions of the employer.

CALIF. LAB. CODE, Sec. 2856;

Brown v. Ferdon, 5 Cal. 2d 226, 54 P. 2d 712 (1936);

Bell v. Minor, 88 Cal. App. 2d 879, 199 P. 2d 718 (1948);

May v. New York Motion Picture Corp., 45 Cal. App. 396, 402-403, 187 Pac. 785 (1920).

A union's arbitrarily imposed control on production is also a violation of the law requiring that parties to a contract deal in the highest degree of good faith and honesty.

Nelson v. Abraham, 29 Cal. 2d 745, 177 P. 2d 931 (1947);

Matzen v. Horwitz, 102 Cal. App. 2d 884, 228 P. 2d 841 (1951).

Though divided on their construction of the Arbitration Act, the authorities agree that an action for damages against a union for violation of a no-strike clause contained in a collective bargaining agreement is not an arbitrable matter in the absence of language in the contract expressly calling for arbitration of such a dispute.

In fact, even the Company and Union are in apparent agreement on this point. The Union concedes that the

alternative ground of decision in *Colonial Hardwood, supra,* was correct (Brief for Appellant p. 5). This alternative ground turned on the arbitrability of the dispute between the parties. The Court held that the issue of the company's damages for breach of a no-strike provision was not arbitrable.

Article IV of the *Colonial Hardwood* contract was entitled "Grievance Procedure" and consisted of seven sections. Section 1 provided for steward representation. Section 2 provided a step by step procedure for the settlement of disputes presented by employees to the stewards, and for reference, if necessary, to the plant committeeman, the superintendent, the plant committee, the general manager, officers of the local and international unions, with final reference to arbitration. The agreement provided that there would be no strikes or lockouts but that the grievance procedure would be the only method of settling disputes "which are the subject of this agreement." The five remaining sections of this Article related to the machinery of the grievance procedure.

The court held that the arbitration clause

> "has relation to the controversies which are made the subject of grievance procedure . . . and not to claims for damages on account of strikes and secondary boycotts which are matters entirely foreign thereto. Damages arising from strikes and lockouts could not reasonably be held subject to arbitration under a procedure which expressly forbids strikes and lockouts and provides for the settlement of grievances in order that they may be avoided. It would have been possible, of course, for the parties to provide for the arbitration of any dispute which might arise between them; but they did not do this,

and the rule *noscitur a sociis* applies to the arbitration clause in the grievance procedure to limit its application to controversies to which the grievance procedure was intended to apply." (168 F. 2d at 35.)

The same reasoning was applied by the Fourth Circuit in *United Electrical Workers v. Miller Metal Products, Inc., supra.* There the grievance clause provided that

> "all differences, disputes and grievances that may arise between the parties to this contract with respect to the matters covered in this agreement shall be taken up as follows: . . ."

There followed a step by step procedure for the adjustment of grievances ending with submission to arbitration.

A subsequent arbitration section provided:

> "All differences, disputes and grievances concerning matters in this contract which have not been satisfactorily settled . . . shall be submitted to arbitration . . ."

The court said, "What we said in the *Colonial Hardwood* case . . . with respect to the contract there involved is clearly applicable to the contract here . . ." (215 F. 2d at 223.)

In *Markel Electric Products, Inc. v. United Electrical Workers, UE,* 202 F. 2d 435 (2nd Cir., 1953), the collective bargaining agreement contained an article entitled "Grievances" providing in part as follows:

> "Should differences arise between the Company and any employee covered by this agreement as to the meaning and application of the performance of this agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work

on account of such differences, but earnest effort shall be made to settle such differences immediately . . ."

The next three paragraphs set forth a three-step grievance procedure by which a dispute was to be referred first to the department foreman and the aggrieved employee and/or his department stewards, then to the general superintendent and the chief steward, and finally to the executives of the Company and the grievance committee and international representative of the Union.

The Article following was entitled "Arbitration" and provided in part:

> "In the event that the two parties to this agreement fail to make a satisfactory adjustment of any dispute or grievance and such dispute or grievance involves a question as to the meaning and application of the performance of this agreement, such dispute or grievance may be submitted to arbitration . . .
>
> "There shall be no lockouts or strikes . . . All complaints or grievances shall be settled in accordance with the full procedure outlined in this agreement."

The Union caused the employees to strike, and the Company brought an action under Section 301 for damages caused by the strike. The defendant Union's motion for stay of all proceedings pending arbitration was denied. The court stated:

> "The whole tenor of the contract was to lay a groundwork of agreement as to wages, hours and conditions of employment and to provide a peaceful method for the settlement of grievances and disputes over the meaning and application of the agreement with respect to those matters."

". . . .

"The dispute as to whether the union was justified in calling the strike is one certainly not capable of resolution at a conference between an employee or a department steward, or both, and a department foreman; or between the chief steward and the general superintendent. It is, therefore, not the kind of dispute which was intended to be resolved by submission to arbitration." (202 F. 2d at 437.)

Appellant cites four cases to show that the Arbitration Act excludes collective bargaining agreements. Two of the cases, *Hoover Motor* and *Harris Hub, supra,,* finally held that the issues before them were not arbitrable issues. The third case, *Tenney, supra,* was remanded for a determination of the issue of arbitrability since the issue could not be determined from the record before that court.

Only the *Lewittes* case, *supra,* held both that collective bargaining agreements were not excluded by the Arbitration Act and that the issue before the court was an arbitrable one.

Hoover Motor Express Co. v. Teamsters Union, AFL, supra, involved an action for damages arising out of the breach of a no-strike clause by the Union. The agreement contained an article entitled "Grievance Machinery and Union Liability," which read in part as follows:

"The Unions and the Employers agree that there shall be no strikes, lockout, tieup, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall apply . . ."

The final step of the procedure provided:

> "Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Committee determine to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse."

The Sixth Circuit in refusing to grant the Union's motion for stay of proceedings and to refer the action for damages to arbitration, stated:

> "Assuming but not deciding that Section 1, which contains no provision for arbitration but does provide in Subsection (d) for submission of deadlocked cases to 'umpire handling,' could be construed as providing for informal arbitration, we think that under this record Section 1 plainly covers only the settlement of grievances. In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance.
>
> ". . . .
>
> "We think that . . . the calling of the strike did not constitute a grievance; that it therefore was not subject to the settlement procedure of Article VIII. Section 1 of the contract contemplates that complaints of employees which might eventually culminate in a strike namely, grievances, were to be settled in a certain manner under Section 1, but the violation of the no-strike agreement of the collective bargaining contract is not a grievance. The record presents no provision that such a situation shall be arbitrated." (217 F. 2d at 53, 54.)

In *Harris Hub Bed & Spring Co. v. United Electrical Workers, UE, supra,* the Pennsylvania district court had

before it a collective bargaining agreement substantially similar to that in the *Markel Electric* case, *supra.* The grievance clause was broad providing that "any claim, difference, dispute or grievance shall be taken up as follows: . . ." There followed a four-step grievance procedure as in the *Markel Electric* case. The final step provided:

> "If no satisfactory settlement is reached, then the difference, dispute or grievance shall at the request of either party be submitted to arbitration as hereinafter provided."

The district judge denied the union's motion for stay pursuant to Section 3 of the Arbitration Act stating:

> "It is clear that the arbitration clause embedded in Article XI has relation to the controversies which are made the subjects of the grievance procedure of that article, and not to claims for damages on account of strikes and lockouts, which are matters entirely foreign thereto. Damages arising from strikes and lockouts could not be held subject to arbitration under a procedure which expressly prohibits strikes and lockouts and provides for the settlement of grievances in order that such may be avoided." (121 F. Supp. at 43.)

The *Lewittes* case relied on by the Union (Brief of Appellant p. 7) concerned a contract containing language much broader than in the instant case:

> "All grievances, complaints, differences or disputes arising out of or relating to this agreement, *or the breach thereof,* shall be settled in the following manner: . . ." (Emphasis added.)

The court specifically pointed out that:

> "The broad language adopted by the parties is unrestricted and . . . the question of damages arising by reason of the defendant's alleged breach of its non-strike pledge is within its ambit . . .
>
> ". . . it includes controversies arising within a breach of the agreement." (95 F. Supp. at 853.)

District Judge McGranery who decided the *Monumental Life* case, *supra*, relied on by *Lewittes,* denied a motion to stay under Section 3 of Arbitration Act in *Metal Polishers Union, AFL, v. Rubin,* 85 F. Supp. 363, 364 (E. D. Pa. 1949).

This was an action brought by the plaintiff union under Taft-Hartley, Section 301, charging that the defendant violated the collective bargaining agreement by locking out members of the plaintiff union.

Judge McGranery stated:

> "But in determining, on a motion for a stay, whether there is anything to arbitrate in the contract sued on, the court must take the moving party's version of the issue: *Shanferoke Coal & Supply Corp. of Del. v. Westchester Service Corp.,* 70 F. 2d 297, affd. 293 U. S. 449. And here the moving party merely maintains that there is an arbitrable issue because of the existence in the contract of a broad-scope arbitration clause to the effect that 'any matter in dispute' between the parties shall be referred to arbitration.
>
> "However, section 2 describes only three types of agreements covered by the Arbitration Act. One, an *ad hoc* agreement to arbitrate an existing dispute, is inapplicable here. The other two are agreements to arbitrate an issue arising out of the contract and to

arbitrate an issue arising out of a refusal to perform the contract. Hence, despite the extremely broad scope of the arbitration clause contained in the contract between the parties herein, the act itself contemplates narrower situations. To justify a stay under the act, there must appear an arbitrable issue arising out of the contract or out of a refusal to perform it and not merely 'any matter in dispute' between the parties. The defendant's assumption, therefore, that the existence of any dispute sufficiently grounds a stay, is erroneous.

". . . .

"The item of damages for breach of a contract is normally arbitrable: (Cases cited.) However, under a labor agreement which expressly forbids strikes and lockouts *pending* the arbitration of disputes, it is not reasonable to suppose that damages *resulting* from a strike or a lockout were contemplated as the subject of arbitration: *International Union, United Furniture Workers of America v. Colonial Flooring Co., Inc.,* 168 F. 2d 33.

"Thus, 'any dispute' between the parties is subject to restrictive interpretation at its broadest. Since it does not cover every conceivable dispute between the parties, more is required than the bare assertion of the existence of an arbitrable issue."

The foregoing authorities show that the dispute between the parties cannot be referred to arbitration under their contract. Only by reading absent language into the contract can the Union urge that this matter is referable to arbitration.

Conclusion.

The Company's action for the Union's breach of the collective bargaining contract cannot be stayed pending arbitration under Section 3 of the United States Arbitration Act since the Act does not apply to this contract.

Even assuming that the Act is applicable, the Company's action does not present an issue referable to arbitration under Section 3 of the Act.

Therefore, this Court should affirm the Order of the court below denying Appellant's Motion to Stay.

Respectfully submitted,

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